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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

RELENTLESS PURSUIT ENTERPRISES, INC., D/B/A LEXUS OF SAN DIEGO, Employer, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL LODGE NO. 1484, DISTRICT LODGE 190, Petitioner.	No. 21-RC-255451 **OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF CERTIFICATION OF REPRESENTATIVE AND REQUEST TO VACATE AND/OR STAY CERTIFICATION OF ELECTION PENDING OUTCOME OF UNFAIR LABOR PRACTICE CHARGE**

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I. INTRODUCTION

Employer Relentless Pursuit Enterprises, Inc.'s ("Employer") Request for Review ("Request") challenges the Region's decision to dismiss its unfair labor practice charge ("ULP") related to the February 4, 2020 interaction that occurred at Employer's dealership—effectively challenging the General Counsel's ("GC") finding that the Union did not violate the Act. It also asserts that somehow the Region was required to order remedies appropriate for remedying ULPs for the conduct that occurred prior to the first election even though the GC had already denied Employer's charge and Employer, itself, had agreed to resolve its objections by waiving its right to Board review and agreeing to a rerun election. The Request primarily challenges alleged conduct that occurred prior to the first election (Req. at 7-9; Ex. F to Req.).[1]

Perhaps recognizing that it failed to file timely objections after the rerun election, Employer filed—on the same day that it filed its Request—a new ULP charge alleging the same conduct that formed the basis of its prior ULP charge and the objections to the first election. While Employer for the first time here alleges that the Union rep sent an objectionable email after the first election, it failed to file timely objections—or any objection at all—relating to this alleged conduct. It may not now cure its failure to meet the governing timeline by bootstrapping this allegation within what is effectively its overall challenge to the GC's decision to dismiss its original charge.

The Board should deny the Employers' Request because the Employer impermissibly seeks to challenge the GC's decision to dismiss its original charge related to the February 4 interaction, seeks Board review of the objections for which it already waived its right to Board review, set aside the results of a rerun election for conduct that occurred prior to the first election, and bootstrap its recently filed ULP into a hybrid objections/ULP hearing despite having failed to file a timely objection—or any objection at all.

[1] All references to exhibits refer to those included with Employer's Request.

II. SUMMARY OF RELEVANT FACTS

On February 4, 2020, there was an interaction that took place in Employer's dealership. On February 11, Employer filed a ULP charge in response to the February 4 interaction. The Union won the February 21 election. On February 28, Employer filed objections and its offer of proof complaining of the February 4 interaction and additionally alleging that Union supporters demanded that voters take photographs of their ballots and threatened voters that if they did not vote for the Union, a vote would be held to expel them from employment after the election (Employer's Objections). Employer alleged that the supporters' demand to take photographs created "an impression of surveillance and a belief that there would be actual surveillance . . . ." (*Id.*).

On or about March 6, 2020, Region 21 issued its Decision to Dismiss the charge. Employer filed an appeal with the GC's office. On or about April 20, 2020, the GC denied Employer's appeal. The Union and the Employer agreed on May 12 that the first election would be set aside and that a rerun election would take place. Both the Union and the Employer agreed through the signed Stipulation that the notice of election would contain language adapted from *Lufkin Rule Co.*, 147 NLRB 341 (1964) that:

> The election conducted on February 21, 2020 was set aside by agreement of the Parties because certain alleged conduct by the Petitioner interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

(Stipulation at 2; Ex. J). This language is effectively identical to the directed notice contained in section 11452.3 of the NLRB Casehandling Manual, Part 2, Representation Proceedings ("CHM"). The Stipulation stated further, "The Parties further waive their rights under the Board's Rules and Regulations to a Regional Director's report, to file exceptions to a Regional Director's report, and to any right to a hearing on the objections or *a Board decision*." (Stipulation at 2—emphasis supplied). The stipulation concludes with "[i]t is further stipulated and agreed by and between the Parties that this stipulation completes the arrangements for the rerun election herein." (at 3).

The rerun election proceeded pursuant to the Stipulation. The Union won the second election. Employer did not file objections to the second election and the Region certified the Union on June 24, 2020.

On July 7, 2020—the same day that it filed its Request for Review—Employer filed a new ULP alleging that the Union "attempt[ed] to surveil the complete ballots of employees to ascertain whether they vote 'yes' or 'no' in an NLRB secret ballot election . . . and threaten[ed] adverse consequences (including loss of employment) if they did not prove to the Union's satisfaction they voted 'yes' for the Union . . . ." (Ex. M). This is the exact same conduct complained of in the objections filed in connection with the first election and the same objections resolved through the rerun election Stipulation, in which the parties waived "any right to a hearing on the objections or a Board decision." (Stipulation at 3).

Employer's Request for Review primarily challenges the alleged conduct that occurred prior to the first election (Req. at 7-9; Ex. F to Req.). The only additional allegation, which appears for the first time in its Request, is that Union agent Jesse Juarez ("Juarez") allegedly sent an email taking credit for the termination of Employer's General Manager (at 10). This is the only conduct alleged to have occurred after the first election (*See generally* Req.). Despite the GC already determining that the Union did not engage in the only unlawful conduct alleged by Employer as of the date the Union was certified, Employer brings this Request alleging that the Region departed from Board precedent in (1) not making sure voters were informed of the actual violations of the Act so as to restore the laboratory conditions before holding the second election and (2) not having the "required specificity of the Union's unlawful conduct" in the Notice of Election for the second election.

III. ARGUMENT

A. EMPLOYER SEEKS TO IMPROPERLY APPEAL THE GC'S FINDING THAT THE UNION DID NOT VIOLATE THE NLRA PRIOR TO THE FIRST ELECTION AND THEN ARGUES THAT THE REGION SHOULD HAVE ORDERED REMEDIES APPROPRIATE ONLY IN ULP CASES

"[D]ecisions by the General Counsel not to issue an unfair labor practice complaint are

not subject to judicial review." *Fitz v. Commc'ns Workers of Am*., No. CIV A 88-1214 (RCL), 1989 WL 226082, at *5 (D.D.C. Aug. 17, 1989), aff'd, 917 F.2d 62 (D.C. Cir. 1990) (citing *NLRB v. United Food and Commercial Workers Union* (*UFCW*), 484 U.S. 112, 125-26 (1987); *NLRB v. Sears. Roebuck & Co*., 421 U.S. 132, 155 (1975); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967)). Neither are they subject to Board review. *UFCW*, 484 U.S. at 124.

Employer's two bases for its Request is that (1) voters were not "informed of the *actual violations of the Ac*t so as to restore the laboratory conditions before holding the second election, and (2) the Regional Director's Notice of Election lacked the required specificity of the Union's *unlawful conduct* and therefore resulted in prejudicial error." (at 5—emphases supplied). In short, Employer seeks Board review of the decisions by both the Region and the GC concluding that the Union did not violate the Act and to displace the Stipulated Election Agreement that it entered into.

To be sure, the first sentence of Employer's Summary of Argument is that the Union engaged in "a gross violation of employees' rights under the Act that eviscerated the employees' free choice in the election process," before characterizing the February 4 incident (at 5-6). Employer then takes issue with the fact that "[t]he Region did not issue a complaint saying the initial conduct was not sufficiently violent for a prolonged period . . . . The Employer made a request to the [GC][2] to review Regional Director's decision, which was denied." (*Id.* at 6). In Part III.A. of its argument, Employer contends that as a result of Juarez's conduct on February 4, '[t]here has been a clear violation of the Act in this circumstance" (at 14); "Juarez's conduct was in fact a threat of physical violence . . . . The factual finding [of the Acting Regional Director and, implicitly, the GC] was simply wrong" (*Compare* Request at 11—quoting the Acting Regional Director—*with* Request at 14); the February 4 conduct "resulted in unlawful coercion and restraint of employees' rights." (Req. at 16). In Part III.B., Employer challenges the Acting

[2] Employer stated that it made a request to the Board to review the Regional Director's decision, but that is not true. This present Request is the only Request made in this RC case to date. And Employer could not have made a request for review with the Board challenging the Region's decision to not issue a complaint.

Regional Director's and GC's investigation of its charge, alleging that the Acting Regional Director failed to evaluate all of the allegations stated in its ULP charge (Req. at 16-17). "The Acting Regional Director completely ignored these facts in coming to a decision [to not issue a complaint]."[3] (*Id.* at 17). And in Part III.C., Employer contends that "[s]imply ordering a new election is not sufficient to remedy an otherwise valid unfair labor practice charge. Ordering a new election, without more, merely leaves the employees to vote under the impact of the original unfair labor practices . . . . For this reason, an order to effectively restore the laboratory conditions required for an election, a remedy must be put into place that restores that laboratory condition." (*Id.* at 18). Together, Employer is challenging the investigation of its original charge by the Acting Regional Director and the GC's decision to not issue a complaint. The Region's and GC's decisions that the Union acted lawfully cannot be challenged through this Request.

In Part III.C., Employer argues that the Acting Regional Director should have ordered remedies appropriate to remedy ULPs and that the "Regional Director's notice to employees was incredibly weak . . . ." (*Id*. at 18-19). Again, Employer cannot challenge the GC's finding that the Union has acted lawfully throughout these proceedings. And the cases Employer cites to argue that the Union should have disavowed its conduct involved a party committing ULPs, a scenario we do not have here (*Id.* at 18-19-citing *Decaturville Sportswear Co. v. NLRB*, 406 F.2d 886, 889 (6th Cir. 1969) ("In view of the Board findings, and ours, that this is an aggravated case of deliberate and flagrant violation of the Act by the company, we concern ourselves only with the appropriateness of the Board's order."); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) ("[A] proposed remedy [must] be tailored to the unfair labor practice it is intended to redress."); *Gaines Elec. Co.*, 309 NLRB 1077, 1081 (1992) ("The Board set forth the standard for an appropriate repudiation of unfair labor practices in *Passavant Memorial Hospital*, 237 NLRB 138 (1978)"). Instead, the proper cure was inclusion of the *Rufkin* notice in the Notices of Election for the rerun election, which was properly included in this case.

[3] The only decision issued by the Acting Regional Director in connection with this RC petition or the CB charge was the decision to dismiss Employer's charge—both the original and rerun election were held pursuant to stipulated election agreements.

Employer may not successfully circumvent the well-established principle that a decision by the GC to not issue a complaint is not subject to Board review. The GC's decision to not issue a complaint cannot be challenged, which Employer tries to do with these portions of its Request. Therefore, nothing in Parts III.A-C. of the Request for Review provides a basis for the Board to grant review of this Request.

B. EMPLOYER'S LATEST ULP CHARGE ALLEGES MISCONDUCT THAT WAS THE SUBJECT OF THE OBJECTIONS TO THE FIRST ELECTION, WHICH WERE ALREADY RESOLVED AND RESULTED IN THE RERUN ELECTION

On the same day that the Employer filed its Request, it filed a new ULP charge in connection with this RC petition (Ex. M to Req.). It alleges conduct that is the exact same conduct complained of in its objections to the first election (*Compare id. with* Ex. E to Req. for Review). In Part III.D., Employer implicitly acknowledges that it is complaining of the same conduct when it refers to the Union's conduct that allegedly occurred "after the filing of the first charge" and that, "[a]s a result, the first election was set aside and a new election was held despite the pendency of new allegations brought to the Regional Director's attention." (Req. at 19). These "new allegations" are not new at all and were contained in the objections and offer of proof that it filed after the first election. That conduct was already resolved when the Region set aside the first election, the parties entered into a stipulated agreement, and the Region approved the Stipulation for the rerun election. It cannot now get a second bite at the apple by using the same conduct that was the basis for its objections to the first election as the basis for its objections to the rerun. After all, "the critical period for the second election begins running from the date of the first election." *Singer Co*., 161 NLRB 956 fn. 2 (1966)." Therefore, nothing in Part III.D. of the Request for Review provides a basis for granting review and the Request should be denied in its entirety.

C. THE BOARD SHOULD DENY THIS REQUEST FOR REVIEW BECAUSE EMPLOYER WAIVED ITS RIGHT TO A BOARD DECISION REGARDING THE CONDUCT IT PRINCIPALLY COMPLAINS OF

On May 13, 2020, the Regional Director approved the Stipulation for the rerun election. This was the stipulation entered into in response to the February 28, 2020 objections filed by

Employer (Stipulation at 1). The parties agreed to resolve those objections and avoid the time and expense of a hearing (*Id.*). The parties requested a rerun election (*Id.*). "The Parties further waive[d] their rights under the Board's Rules and Regulations to a Regional Director's report, to file exceptions to a Regional Director's report, and to any right to a hearing on the objections or a Board decision." (*Id.* at 3). Despite this waiver, Employer filed the present Request challenging the same alleged conduct that was resolved through the Stipulation. Therefore, the Board should deny Employer's Request as it relates to all of the conduct complained of in its February 28 objections, including the conduct now complained of through the ULP charge filed on the same day as its Request.

D. THE BOARD SHOULD DENY THIS REQUEST FOR REVIEW BECAUSE EMPLOYER PRINCIPALY COMPLAINS OF CONDUCT OCCURRING *BEFORE* THE FIRST ELECTION

Almost all of the conduct complained of allegedly occurred prior to the first election. "[T]he critical period for the second election begins running from the date of the first election." *Singer Co*., 161 NLRB 956 fn. 2. Therefore, even if Employer somehow didn't waive its right to review by the Board, any allegations occurring prior to the first election may not be the subject of overturning the results of the second election, which it now seeks to do. For this reason, this Request should be denied as to any such alleged conduct.

E. THE BOARD SHOULD DENY THIS REQUEST FOR REVIEW BECAUSE EMPLOYER DID NOT FILE OBJECTIONS REGARDING THE ONLY CONDUCT ALLEGED TO HAVE OCCURRED AFTER THE FIRST ELECTION

The only conduct alleged to have occurred after the first election is Juarez's alleged email taking credit for the termination of Employer's General Manager (Req. at 10). In order for an objection to be timely, it must be filed and served within seven days after the tally of ballots has been prepared. 29 C.F.R. § 102.69(a).[4] Employer never filed objections to the rerun election. Therefore, the Board should reject Employer's effort to back-door this allegation through a

[4] This is the language of this regulation in effect prior to the new ones taking effect on May 31, 2020. If the current regulation applies, Employer had five business days to file objections. Employer missed either deadline.

request for review that otherwise challenges the decision to dismiss its ULP charge and conduct allegedly occurring prior to the first election.

F. THE BOARD SHOULD NOT SANCTION EMPLOYER'S BAIT AND SWITCH STRATEGY OF RESOLVING THE ELECTION OBJECTIONS, WAITING TO FILE A ULP FOR THE SAME CONDUCT, AND DELAYING THIS RC PETITION PENDING THE OUTCOME OF THE ULP PROCEEDING

Employer already resolved the objections it stated for the first election with the Stipulation. It did not file a ULP regarding that conduct until the day that its Request for Review was filed, nearly two months after the Stipulation for rerun election was approved. As of when the Region certified the Union, there was no ULP pending. Employer has stated no legal basis to stay the certification pending the outcome of this ULP complaining of the same conduct that it already resolved and waived its right to a hearing over through the Stipulation.

IV. CONCLUSION

For these reasons, the Union respectfully requests that the Board deny Employer's Request in its entirety.

Dated: July 14, 2020

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/S/ DAVID W. M. FUJIMOTO
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CERTIFICATE OF SERVICE - 21-RC-255451

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on July 14, 2020, I electronically filed the forgoing **OPPOSITION TO REQUEST FOR REVIEW** with the National Labor Relations Board, by using the Board's Electronic Filing system.

On July 14, 2020, I served the following documents in the manner described below:

OPPOSITION TO REQUEST FOR REVIEW

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on July 14, 2020.

Lara Hull

Lara Hull